

IN THE COURT OF APPEALS OF IOWA

No. 0-131 / 09-1260
Filed April 8, 2010

DB ACOUSTICS, INC.,
Intervenor-Appellant,

vs.

**GREAT RIVER CONTRACTORS, L.L.C.,
WASHINGTON COMMUNITY SCHOOL DISTRICT
TRAVELERS CASUALTY & SURETY COMPANY
OF AMERICA, and FRED BAXTER GENERAL
CONTRACTOR, INC.,**
Defendants-Appellees.

Appeal from the Iowa District Court for Washington County, James Q.
Blomgren, Judge.

Intervenor DB Acoustics, Inc. appeals from the district court's ruling
requiring it to participate in arbitration. **AFFIRMED.**

Kevin H. Collins of Nymaster, Goode, West, Hansell & O'Brien, P.C.,
Cedar Rapids, for appellant.

Richard L. Fehseke III of Fehseke & Eschman Law Offices, Fort Madison,
for appellee Frank Baxter General Contractor.

Randall P. Schueller, Des Moines, for appellee Washington Community
School District.

Fred Cote, appellee pro se.¹

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

¹ Fred Cote has filed an “Appellee’s Brief” (though the arguments made in the brief are in support of *appellant’s* position) for Great River Contractors, L.L.C. “pro se.” “As a general rule, Iowa requires businesses to appear only by lawyer, while a natural person may appear for himself.” *In re N.N.E.*, 752 N.W.2d 1, 12 (Iowa 2008). It does not affirmatively appear from the record that Cote is a licensed attorney. Cote’s purported representation is highly improper if he is not a licensed attorney.

Moreover, Cote’s brief asserts facts not contained in the record, see Iowa R. App. P. 6.903(2)(f) (requiring statement of facts to be supported by references to the record), and cites no authority for any of the issues raised. We therefore deem all Great River’s issues waived. See Iowa R. App. P. 6.903(2)(g)(3) (requiring an argument section that contains “citations to the authorities relied on and references to the pertinent parts of the record in accordance with rule 6.904(4). Failure to cite authority in support of an issue may be deemed waiver of that issue”).

DANILSON, J.

Intervenor DB Acoustics, Inc. appeals from the district court's ruling requiring it to participate in arbitration.

I. Background Facts and Proceedings.

This action began with Great River Contractors, L.L.C.'s (Great River's) petition to adjudicate its rights to the statutory retainage and to recover on the bond in relation to school construction projects in the Washington Community School District. See Iowa Code ch. 573 (2007).² Great River was a subcontractor to Frank Baxter General Contractor, Inc. (Baxter). In its petition, Great River asserted it "performed as required by contract with Baxter."

Section 30 of Great River's contract with Baxter provides:

In the event Subcontractor enters any agreement, whether oral or written, with any other person or entity to perform work upon, or provide services, equipment, or materials for the Project, Subcontractor shall require each such person or entity, to the extent of the work performed by each such person or entity, to be bound to Subcontractor by the terms of this Agreement and to assume toward the Subcontractor all the obligations and responsibilities which Subcontractor, by this Agreement, assumes toward Contractor. Subcontractor shall provide any such person or entity with copies of this Agreement and the contract executed between Contractor and the Owner.

DB Acoustics moved to intervene in the chapter 573 action, alleging it had "supplied materials and labor to the general contractor Baxter General Contractor, Inc through a subcontractor (Great River Contractors, LLC)" on the school projects and had not been paid. The motion to intervene was granted.

² Iowa Code chapter 573 governs "Labor and Material on Public Improvements." See generally *Economy Forms Corp. v. City of Cedar Rapids*, 340 N.W.2d 259 (Iowa 1983).

Defendant Baxter filed an application for order compelling arbitration and to stay the proceedings. Baxter cited section 17 of its subcontract with Great River and section 4.6.2 of the “prime contract” Baxter had with Washington County School District as the bases for its application to compel arbitration. Section 17 of the subcontract provides, in part:

In the event the contract between Contractor and Owner provides for arbitration, then any controversy between Contractor and Subcontractor which would be governed by said arbitration provisions had the controversy arisen between Owner and Contractor shall be determined in the same manner, under the same procedures, and to the same extent as specified in said contract.

Section 4.6.2 of the prime contract states, in part:

Claims not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect.

DB Acoustics filed a resistance to the application to compel arbitration, contending it “is not a party to any agreement requiring arbitration.” DB Acoustics asked the court to except it from any order compelling arbitration and allow it to proceed with its chapter 573 action.

On July 31, 2009, following a July 17 hearing,³ the court filed its ruling on the application to stay proceedings.

The primary contract requires arbitration pursuant to the terms of Section 4.6.2. In Iowa, arbitration is favored and any arbitration agreement must be construed broadly to effectuate its purposes. Arbitration is certainly looked on favorably as an alternative to civil litigation and is favored as a means of settling civil disputes without the expense and delay of litigation.

DB Acoustics claims it does not have a written contract and is not subject to any clause requiring arbitration contained in other

³ No transcript of the hearing appears in the record.

contracts. However, if any non-signatory claims arise out of and are related directly to the original agreement, arbitration is appropriate. Certainly a non-signatory could enforce an arbitration clause against a signatory if the relationship is sufficiently close. Normally because of the strong national policy in favor of arbitration, doubts about whether an arbitration clause should be construed to cover a particular dispute are generally resolved in favor of arbitration.

The court granted the motion to compel arbitration, including DB Acoustics, and stayed further proceedings.

DB Acoustics then filed an application for interlocutory appeal, which the supreme court granted. The appeal was then transferred to this court.

II. Scope and Standard of Review.

We review a ruling on a motion to compel arbitration for correction of errors at law. *Wesley Retirement Serv., Inc., v. Hansen Lind Meyer, Inc.*, 594 N.W.2d 22, 29 (Iowa 1999).

III. Discussion.

DB Acoustics contends it is not a party to any agreement requiring arbitration. It asserts it is not a signatory to either the primary contract or the subcontract with Great River. It is true that “arbitration is a matter of contract and parties cannot be compelled to arbitrate a question which they have not agreed to arbitrate.” *Bullis v. Bear, Stearns & Co.*, 553 N.W.2d 599, 601-02 (Iowa 1996). However, our supreme court has recognized that a nonsignatory can be bound by an agreement to arbitrate. *Id.* at 602.⁴

“To compel arbitration, [Baxter] ‘must show, at a bare minimum, that the protagonists have agreed to arbitrate *some* claims.’” *Id.* at 601 (citation omitted).

⁴ The *Bullis* decision dealt with a controversy governed by the Federal Arbitration Act. 553 N.W.2d at 601.

Baxter must also show that, under Iowa law, DB Acoustics is bound by the arbitration agreements at issue. *Id.* at 601.

Here, Baxter has shown that the primary contract and its contract with Great River require arbitration. Moreover, under that subcontract, Great River agreed:

In the event Subcontractor enters any agreement, *whether oral or written*, with any other person or entity to perform work upon, or provide services, equipment, or materials for the Project, Subcontractor shall require each such person or entity . . . to assume toward the Subcontractor all the obligations and responsibilities which Subcontractor, by this Agreement, assumes toward Contractor.

(Emphasis added.) Great River was required to “provide any such person or entity with copies of this Agreement and the contract executed between Contractor and the Owner.” Great River asserted it had complied with its contract with Baxter, which necessarily includes the above, and this record does not demonstrate otherwise.

DB Acoustics claims not to have a written contract with Great River, but does not contest that an oral contract is binding upon the parties. In fact, DB Acoustics intervened, in part, on the basis of its contract with Great River. The record before us is that under its contract with Great River, DB Acoustics “assume[d] toward the Subcontractor all the obligations and responsibilities which Subcontractor, by this Agreement, assumes toward Contractor,” which included the arbitration provisions.

Additionally, it is pertinent to note that in determining the applicability of the Federal Arbitration Act to nonsignatories to a contract, the U.S. Supreme Court has observed, “[T]raditional principles’ of state law allow a contract to be

enforced by or against nonparties to the contract through ‘assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.’” *Arthur Andersen L.L.P. v Carlisle*, ___ U.S. ___, ___, 129 S. Ct. 1896, 1902, 173 L. Ed. 2d 832, 840 (2009) (quoting 21 Richard A. Lord, *Williston on Contracts* § 57:19, at 183 (4th ed. 2001)).

Moreover, here, the very nature of DB Acoustic’s motion to intervene suggests that DB Acoustics is claiming to be a third-party beneficiary. Our review of the contract between Great River and Baxter supports such a claim. *See RPC Liquidation v. Iowa Dep’t. of Transp.*, 717 N.W.2d 317, 319-20 (Iowa 2006) (discussing third-party beneficiaries and noting that the primary question is “whether the contract manifests an intent to benefit a third party,” which intent need not benefit the third-party directly). As a third-party beneficiary of the contract, DB can be compelled to arbitrate its claim.

On the record, we conclude the district court did not err in granting the motion to compel arbitration.

AFFIRMED.